12-9-2014

Jackson v. State Appellant's Brief Dckt. 42116

IN THE SUPREME COURT OF THE STATE OF IDAHO

PONY LEO JACKSON, Petitioner-Appellant, v. STATE OF IDAHO, Respondent.	NO. 42116 CLARK COUNTY NO. CV 2012-18 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLARK

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STATEMENT OF THE CASE

Nature of the Case

Pony Leo Jackson appeals from the district court's Judgment denying his petition for post-conviction relief. He asserts that the district court erred in denying two of his post-convictions claims. Claim two asserted that Mr. Jackson received ineffective assistance of counsel when defense counsel failed to object, during opening statements, to a statement made by the prosecutor that the reason K.W. came forward to report that she had been molested by Mr. Jackson was that she had seen a television news report that police were looking for additional molestation victims of Mr. Jackson's. He asserts that this statement was made in direct violation of a pre-trial ruling limiting discussion of this topic to a "general and innocuous" statement about a police inquiry. Claim seven relates to a similar ineffective assistance of counsel claim that Mr. Jackson received ineffective assistance of counsel when defense counsel failed to object when the prosecutor asked the alleged victim K.W. about the same report and again implied that there were additional victims that he had molested.

Claims two and seven were denied after the district court determined that the prosecutor's statement and the statement made by K.W. did not violate the trial court order, that the information was admissible under I.R.E. 404(b), and because it was a tactical decision on the part of defense counsel to not object to the information. Mr. Jackson asserts that both of these claims were erroneously denied because the statements clearly violated the trial court's order, the information was not admissible under I.R.E. 404(b), and, as defense counsel testified, the failure to object was not a strategic decision on counsel's part. Additionally, he asserts that he has proven that he

received ineffective assistance of counsel in both claims two and seven. As such, Mr. Jackson asserts that the Judgment and order denying claims two and seven must be reversed.

Statement of the Facts and Course of Proceedings

On September 30, 2008, a Prosecutor's Information was filed charging Mr. Jackson with two counts of lewd conduct and two counts of penetration by a foreign object. (Exhibit 2, pp.14-15.) Prior to selecting a jury, the district court dismissed both counts of penetration by a foreign object because the alleged incidents occurred outside of the statute of limitations. (Exhibit 1, p.30, Ls.7-14.) The case was then submitted to the jury, who returned guilty verdicts for both counts of lewd conduct. (Exhibit 1, p.361, Ls.1-7.) Mr. Jackson was sentenced to a unified sentence of twenty years, with ten years fixed, for each count, to be served concurrently. (Exhibit 2, pp.109-111.) Mr. Jackson filed a Notice of Appeal timely from the district court's Judgment of Conviction. (Exhibit 2, pp.116-117.) The Idaho Court of Appeals concluded that Mr. Jackson had failed to demonstrate that the alleged prosecutorial misconduct amounted to fundamental error and issued an Opinion affirming the judgment of conviction. (Exhibit 2, pp.149-157.)

On July 23, 2012, Mr. Jackson filed a Petition for Post-Conviction Relief. (R., pp.1-5.) Mr. Jackson also requested the appointment of counsel. (R., pp.10-12.) Counsel was later appointed. (R., pp.16.)

Mr. Jackson's claims were articulated in Attachment A to the First Affidavit of Petitioner:

Claim One:

> Ineffective Assistance of Trial Counsel: Failed to Challenge Juror for Cause
>
> Mr. Jackson's Trial Counsel had been constitutionally ineffective in failing to challenge juror No.1 for cause. . . .

Claim Two:

> Ineffective Assistance of Trial Counsel: Failed to Object to Prosecutions Opening Statement to the Jury.
>
> Mr. Jackson's Trial Counsel has been constitutionally ineffective in failing to object to the Prosecutions opening statement to the jury...

Claim Three:

> Ineffective Assistance of Trial Counsel: Trial Counsel's Opening Statement Amounted To Non-Functional Advocacy
>
> Mr. Jackson's Trial Counsel has been constitutionally ineffective when giving his opening statement to the jury. . . .

Claim Four:

> Ineffective Assistance of Trial Counsel: Failed to Object to Hearsay Testimony
>
> Mr. Jackson's Trial Counsel has been constitutionally ineffective in failing to object to State's first witness, Detective Steven Anderson's testimony about his investigation regarding the alleged sexual abuse of the victim. . . .

Claim Five:

> Ineffective Assistance of Trial Counsel: Failed to Object to Prosecution Engaging in Impermissible Vouching for the Victim
>
> Mr. Jackson's Trial Counsel has been constitutionally ineffective in failing to object to the prosecution in vouching for the victim, both by asking a witness to testify about the credibility of the alleged victim and by stating that the prosecutor believed the victim and her story during closing arguments. . . .

Claim Six:

> Ineffective Assistance of Trial Counsel: Failed to Object and move for mistrial
>
> Mr. Jackson's Trial Counsel has been constitutionally ineffective in failing to object to the prosecution [eliciting] testimony from the victim about non-charged conduct with the victim. . . .

Claim Seven:

> Ineffective Assistance of Trial Counsel: Failed to Object to Inadmissible Prejudicial Evidence
>
> Mr. Jackson's Trial Counsel has been constitutionally ineffective in failing to object to the prosecution [eliciting] from the alleged victim prejudicial evidence that the district court ruled was inadmissible because the prejudicial effect outweighed any probative value. . . .

Claim 8:

> Ineffective Assistance of Trial Counsel: Trial Counsel Introduced Prejudicial Evidence and [Elicited] Prejudicial Testimony
>
> Mr. Jackson's Trial Counsel has been constitutionally ineffective in introducing prejudicial evidence and [eliciting] prejudicial testimony from witnesses Detective Steven Anderson and [K.W.], when Trial Counsel asked questions about other potential victim. . . .

Claim 9:

> Ineffective Assistance of Trial Counsel: Trial Counsel Introduced Prejudicial Evidence and [Elicited] Prejudicial Testimony
>
> Mr. Jackson's Trial Counsel has been constitutionally ineffective in introducing prejudicial evidence and in [eliciting] prejudicial testimony throughout trial proceedings. . . .

Claim 10:

> Ineffective Assistance of Trial Counsel: Failed to Object to Prosecution[']s Closing Argument to the Jury
>
> Mr. Jackson's Trial Counsel has been constitutionally ineffective in failing to object to the Prosecution[']s closing argument to the jury. . . .

Claim 11:

> Ineffective Assistance of Trial Counsel: Actual / Factual Innocence
>
> Mr. Jackson is actually and factually innocent of committing the charged crimes based upon verifiable information contained in two polygraph tests, one prior to Jury Trial and one which was part of [a] government initiated – government administered Psychosexual Evaluation which contained a Polygraph test and the results showing a "numerical evaluation non-deceptive." . . .

(R., pp.20-78.)

The State then filed a Motion to Dismiss Petition for Post Conviction Relief asserting that the "Petitioner has no evidentiary basis for his claims . . . petitioner's allegations are not supported by admissible evidence," he failed to prove both deficient performance and prejudice, and the claims are conclusory. (R., pp.82-83.)

Following a hearing on the motion for summary dismissal, the district court dismissed claims one, three, four, five, a portion of claim nine, ten and eleven. (R., pp.101-131.) Claims one and three were dismissed based upon the district court finding that the actions of the defense attorney were tactical or strategic decisions. (R., pp.106-109, 112-113.) Claim four was dismissed because Mr. Jackson's petition failed to identify specific portions of the testimony of Detective Steven Anderson involved hearsay and, as such, the claim was conclusory and not supported by evidence.[1] (R., p.113.) Claim five was dismissed because Mr. Jackson could not show prejudice as to the vouching by the alleged victim's mother and because the prosecutor's statements were merely reasonable inferences from the evidence, as held,

[1] At the summary dismissal hearing, Mr. Jackson's attorney was able to point out specific instances of hearsay testimony contained within the general citation provided in the petition. (Tr. 7/18/13, p.64, L.24 – p.66, L.12.) However, despite being offered time and the opportunity to do so, he failed to amend the petition. (R., pp.95-96.)

in both instances, by the Court of Appeals.[2] (R., pp.114-117.) The portion of claim nine dealing with information being provided to the jury that Mr. Jackson has hurt a dog, was dismissed because Mr. Jackson did not provide the court with a copy of the exhibit that would purportedly prove the claim.[3] (R., pp.124-125.) Claim ten was dismissed based upon language in the Court of Appeals opinion that the comment, by the prosecutor, alleged to have been an appeal to the passions and prejudices of the jury did not alter the outcome of the trial and that the comments, by the prosecutor, alleged to have been a comment that Mr. Jackson had failed to present evidence of his innocence was actually just fair rebuttal to defense counsel's statements.[4] (R., pp.125-128.) Claim eleven was dismissed because the polygraphs were inadmissible at trial. (R., pp.129-130.) The motion was denied as to the remaining claims and claims two, six, seven, eight, and a portion of claim nine went to evidentiary hearing. (R., pp.101-131.)

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[2] At the summary dismissal hearing, Mr. Jackson's attorney clarified that despite the Court of Appeal's opinion, Mr. Jackson could show prejudice if the court looked at the issue in terms of it being reviewed by the Court at the time of the objection or, on appeal, for fundamental error which precluded a cumulative error analysis: "under the cumulative error doctrine there are so many errors here I think Mr. Jackson, if his attorney would have been objecting, and the Court would have been overruling those objections, I think the Court would have another basis to over turn the conviction." (Tr. 7/18/13, p.70, Ls.7-11.) Yet, Mr. Jackson's post-conviction counsel again did not amend the petition to assert this new prejudice argument.

[3] Mr. Jackson concedes that the document discussed was not part of the post-conviction file. Post-conviction counsel failed to request that the court take judicial notice of the trial exhibits in the underlying criminal case either prior to or during the summary dismissal hearing.

[4] At the summary dismissal hearing, Mr. Jackson's attorney clarified that despite the Court of Appeal's opinion, Mr. Jackson could prove ineffective assistance of trial counsel because, if the comments were a proper response to defense counsel's statements, it was ineffective assistance to make statements in closing that would result in the prosecution's statements. (Tr. 7/18/13, p.87, L.13 – p.88, L.7.) However, the petition was again not amended to present this claim.

The State filed a Memorandum of Law asserting, in part, that the prosecution did not violate the district court order as articulated in claims two and seven because the order only directed the prosecutor to stay away from the pornography charges and, as such, the television report was admissible as long as pornography charges were not mentioned.[5] (R., pp.141-142, 147-149.)

An evidentiary hearing was held. (*See generally* Tr. 3/12/4.) The State then filed a Supplemental Memorandum of Law addressing claims six, eight and nine, but not specifically addressing claims two and seven. (R., pp.175-188.) The district court then issued its Findings of Fact and Statements and Conclusions of Law in which it found that none of Mr. Jackson's post-conviction claims warranted relief. (R., pp.197-216.) A Judgment was issued denying and dismissing the petition. (R., pp.218-219.) Mr. Jackson filed a Notice of Appeal timely from the Judgment. (R., pp.220-223.)

[5] The State discussed each of the remaining counts in the memorandum. However, for the purposes of this appeal further discussion of claims six, eight and nine will be limited.

ISSUE

Did the district court err in denying claims two and seven of Mr. Jackson's Petition for Post-Conviction Relief following an evidentiary hearing on the claims?[6]

[6] Claims two and seven related to same overall issue and will be addressed together as one issue for purposes of this appeal.

ARGUMENT

The District Court Erred In Denying Claims Two And Seven Of Mr. Jackson's Petition For Post-Conviction Relief Following An Evidentiary Hearing On The Claims

A. Introduction

Mr. Jackson asserts that the district court erred in denying claims two and seven of his post-conviction. He asserts that both of these claims were erroneously denied because the statements clearly violated the trial court's order, the information was not admissible under I.R.E. 404(b), and, as defense counsel testified, the failure to object was not a strategic decision on counsel's part. Additionally, he asserts that he proved that he received ineffective assistance of counsel and the required prejudice.

B. Relevant Jurisprudence

Upon review of a district court's denial of a petition for post-conviction relief when an evidentiary hearing has occurred, Idaho's appellate courts will not disturb the district court's factual findings unless they are clearly erroneous. *McKinney v. State*, 133 Idaho 695, 700 (1999) (*citing* I.R.C.P. 52(a)); *Russell v. State*, 118 Idaho 65, 67 (Ct. App. 1990). When reviewing mixed questions of law and fact, the appellate court defers to the district court's factual findings supported by substantial evidence, but freely reviews the application of the relevant law to those facts. *Id.* (citing *Young v. State*, 115 Idaho 52, 54 (Ct. App. 1988)).

The Sixth Amendment right to counsel "is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970)). To prevail on a claim of ineffective assistance of counsel, a petitioner must first show that trial counsel's performance was

constitutionally deficient. *Id. at* 687; *Aragon v. State*, 114 Idaho 758, 760 (1988). In addition to proving deficient performance, a petitioner must also demonstrate prejudice, which is defined as a, "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "A defendant need *not* show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693 (emphasis added). The "result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694. Instead, a lesser standard is applied, to wit, whether there is a reasonable probability that the result of the proceeding would have been different. *Id.*

"[S]trategic and tactical decisions will not be second guessed or serve as a basis for post-conviction relief under a claim of ineffective assistance of counsel unless the decision is shown to have resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review." *State v. Dunlap*, 155 Idaho 345, 386 (2013) (quoting *Pratt v. State,* 134 Idaho 581, 584 (2000)).

C. The District Court Erred In Denying Claims Two And Seven Of Mr. Jackson's Petition For Post-Conviction Relief Following An Evidentiary Hearing On The Claims

Mr. Jackson asserts that the district court erred in denying claims two and seven of his post-conviction petition. He maintains that he proved the claims, that the district court's factual findings were clearly erroneous, and that the district court's analysis on the claims was both legally and factually erroneous.

On appeal, Mr. Jackson is asserting that the district court's rulings were erroneous as to claims two and seven:

Claim Two:

> Ineffective Assistance of Trial Counsel: Failed to Object to Prosecutions Opening Statement to the Jury.
>
> Mr. Jackson's Trial Counsel has been constitutionally ineffective in failing to object to the Prosecutions opening statement to the jury...
>
> a. Supporting Facts:
>
> 1. On the first day of Jury trial, March 17, 2009. Prior to selecting a jury[,] the Court took up pre-trial business addressing the State's concern about how to deal with why the alleged victim came forward to report the abuse when she did. (Tr., p.33. L.21 – p.36, L1.)
>
> 2. After the jury was selected, the State made it's opening statement to the jury. (Tr., p133, L.1 – p.137, L.11.) While presenting its opening statement, the prosecution violated the district court's order regarding the alleged victim's reason for reporting, stating:
>
> > "If I remember right, she, when this initially happened, she told her mother as I recall; but it wasn't until 2007, in January of 2007, when there was a report on the news that anybody who had been molested by Pony Jackson, if they would contact the sheriff's office or law enforcement office had wanted them to do that. . . ." (Tr., p.136, Ls.1-8.)
>
> 3. The prosecution having already been informed by the Court that any evidence about the charges mentioned in the television report were not admissible, overly prejudicial evidence. The prosecution disregarded the district court's order when making his opening statement.
>
> 4. Based on the Court's order[,] Mr. Jackson's Defense Counsel, Todd Erikson, failed to object to the prosecution's blatant and deliberate disregard of the courts order when he put before the jury in his opening statement, inadmissible[,] prejudicial evidence.

5. But for counsel's errors in this regard it prejudiced Mr. Jackson in this regard and that as a result he was denied a fair trial. . . .

(R., pp.28-31.)

Claim Seven:

Ineffective Assistance of Trial Counsel: Failed to Object to Inadmissible Prejudicial Evidence

Mr. Jackson's Trial Counsel has been constitutionally ineffective in failing to object to the prosecution [eliciting] from the alleged victim prejudicial evidence that the district court ruled was inadmissible because the prejudicial effect outweighed any probative value.

a. Supporting Facts:

1. Prior to selecting a jury on the opening day of trial[,] March 17, 2009[, t]he district court took up some pre-trial business addressing the State's concern about how to deal with why the alleged victim cam forward to report the abuse when she did:

> MR. SIMPSON (Prosecutor): Okay. The other issue I've got is, [K. W.], she is now 21. This happened when she was four years old. The way this came about is, is that a couple of years ago, in 2007, she was watching the news and Pony Jackson had been arrested for child pornography and the news said if anyone out there has been molested by Pony Jackson, would you please contact the law enforcement. I mean, that's kind of my paraphrasing of it.
>
> And so my question is, is I'm sure Todd [defense counsel] is going to object if that – to that kind of information coming in; and I just – I want to know the boundaries of this. Again, I don't want any mistrials or appealable issues. Do you want me to avoid that issue unless Todd raises it? I mean, I think I can get – I think I can say, "Did you contact law enforcement and for what reason did you contact law enforcement," without getting into the –
>
> THE COURT: Right. If you can, I mean, that's going to be much better. It's going to be problematic if she's – if this evidence of charges for child pornography come in

because that can be unfairly prejudicial. I mean, certainly she can testify that she became aware that he was involved. Well—

MR. SIMPSON: Yeah. I mean, how do we – how does the jury understand that all of a sudden she – because I think part of Todd's defense is that why wait all this time and then all of a sudden you do it. So how do I –

THE COURT: Well, she can testify – and this may take some coaching on your part so we don't get into a problem – but that she saw a report about Pony Jackson and –

MR. SIMPSON: But don't mention it was on child pornography; she saw a report?

THE COURT: Yeah, it wasn't based on child pornography issues but that he was involved – that was – that he was involved – there was a law enforcement inquiry regarding Pony Jackson and that prompted her to come forward, something general and innocuous like that. Certainly she can talk about this was generated by a law enforcement inquiry; but if she can stay away from the charges, we're going to be a lot better off.

MR. SIMPSON: Okay. I think I can coach her on that. I talked to her about that yesterday too. And, of course, a lot of that depends on what you ask her on cross-examination, what I can get into, I'm assuming, after that. But that's the way – those are my –

THE COURT: So, I mean, that – the evidence of prior crimes and prior acts can come in if the door gets opened on that. But, I mean, right now that – you want to treat that as being unfairly prejudicial, the prejudice doesn't outweigh the probative value. But if there's a door gets [sic] opened, then that does come in.

2. After jury selection[,] the prosecution called it[s] witnesses. The second witness was the alleged victim, [K.W.]. (Tr., p.173, L.1-3.) [K.W.] testified about the alleged sexual abuse committed by Mr. Jackson. (Tr., p.179, L.15 – p.184, L.25.) The prosecution then asked K.W. the following:

> Q. When you were older, did there come a time when you reported this incident?
>
> A. Yes.
>
> Q. What brought that about?
>
> A. My mom called me and told me that on the news they had said that Pony Jackson had been arrested and that anybody else that had been molested by him, to please come forward.
>
> (Tr., p.185, L.23 – p.186, L.5.)
>
> 3. The prosecutor's failure to properly coach it[s] witness permitted the Jury to hear prejudicial testimony that violated the Court[']s order regarding the evidence of prior crimes and prior acts.
>
> 4. Based on the foregoing, Mr. Jackson's trial counsel failed to object to the alleged victim[']s actual testimony when it violated the district court[']s order which allowed inadmissible and prejudicial evidence to enter the [juror's] minds. But for counsel[']s error in this regard it prejudiced Mr. Jackson in this regard and that as a result he was denied a fair trial. . . .

(R., pp.50-55.)

The State filed a Motion to Dismiss Petition for Post Conviction Relief. (R., pp.82-83.) Following a hearing on the motion for summary dismissal, the district court denied the motion for summary dismissal for claims two, six, seven, eight, and a portion of claim nine went to evidentiary hearing. (R., pp.101-131.)

The State filed a Memorandum of Law asserting, in part, that the prosecution did not violate the district court order as articulated in claims two and seven because the order only directed the prosecutor to stay away from the pornography charges and, as such, the television report was admissible as long as pornography charges were not mentioned. (R., pp.141-142, 147-149.)

At the evidentiary hearing, Mr. Jackson's counsel presented the testimony of Anne Taylor, the petitioner's expert witness. (Tr. 3/12/14, p.7, L.20 – p.63, L.14.) Ms. Taylor read the trial transcript and the opening statements. (Tr. 3/12/14, p.32, Ls.19-22.) After discussing the prosecutor's comment regarding the television report, Ms. Taylor noted that she would have objected and that the statement was in violation of the court's order to say that there was a law enforcement inquiry. (Tr. 3/12/14, p.34, Ls.6-22.) The trial prosecutor and defense attorney also testified at the hearing. (Tr. 3/12/14, p.64, L.23 – p.104, L.4, p.104, L.4 – p.137, L.25.)

Following the evidentiary hearing, the State filed a Supplemental Memorandum of Law addressing claims six, eight and nine, but not specifically addressing claims two and seven. (R., pp.175-188.) The district court then issued its Findings of Fact and Statements and Conclusions of Law in which it found that none of Mr. Jackson's post-conviction claims warranted relief. (R., pp.197-216.) In denying Claim Two, the district court reviewed the language of the pre-trial conversation and ruling on what could be discussed regarding the news report and the relevant portion of the prosecutor's opening statement. (R., pp.205-208.) The court specifically held that:

> In summary, the prosecutor's comments regarding the Solicitation did not violate the court's order. They should not have been excluded under Rule 403 or Rule 404(b). Furthermore, the decision not to object to the prosecutor's statements concerning the Solicitation was a tactical decision and consistent with defense counsel's trial strategy. Finally Jackson did not argue that but for defense counsel's deficient performance the results of the trial would have been different.

(R., p.208.)

The district court did not issue a separate explanation in denying claim seven. (R., p.213.) Instead, the district court merely noted that claims two and

seven were "essentially identical" and that the holding was the same. (R., p.213.)

1. The District Court's Ruling That The Prosecutor Did Not Violate The Trial Court's Order Is Erroneous

The district court ruled that:

> The court's instruction to the parties was that the Victim could testify there had been a law enforcement inquiry regarding Jackson that prompted her to contact them. But, she was to "stay away" from the charges. The charges referred to in the Solicitation were child pornography charges.
>
> The prosecutor's reference to law enforcement's Solicitation did not mention the child pornography charges and, therefore, complied with the court's order.

(R., p.206.)

Prior to the trial, the district court addressed the State's concern about how to deal with why the alleged victim came forward to report the abuse when she did. The relevant language is as follows:

> MR. SIMPSON (Prosecutor): Okay. The other issue I've got is, [K. W.], she is now 21. This happened when she was four years old. The way this came about is, is that a couple of years ago, in 2007, she was watching the news and Pony Jackson had been arrested for child pornography and the news said if anyone out there has been molested by Pony Jackson, would you please contact the law enforcement. I mean, that's kind of my paraphrasing of it.
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> And so my question is, is I'm sure Todd's [defense counsel] is going to object if that – to that kind of information coming in; and I just – I want to know the boundaries of this. Again, I don't want any mistrials or appealable issues. Do you want me to avoid that issue unless Todd raises it? I mean, I think I can get – I think I can say, "Did you contact law enforcement and for what reason did you contact law enforcement," without getting into the –
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> THE COURT: Right. If you can, I mean, that's going to be much better. It's going to be problematic if she's – if this evidence of charges for

child pornography come in because that can be unfairly prejudicial. I mean, certainly she can testify that she became aware that he was involved. Well—

MR. SIMPSON: Yeah. I mean, how do we – how does the jury understand that all of a sudden she – because I think part of Todd's defense is that why wait all this time and then all of a sudden you do it. So how do I –

THE COURT: Well, she can testify – and this may take some coaching on your part so we don't get into a problem – but that she saw a report about Pony Jackson and –

MR. SIMPSON: But don't mention it was on child pornography; she saw a report?

THE COURT: Yeah, it wasn't based on child pornography issues but that he was involved – that was – that he was involved – **there was a law enforcement inquiry regarding Pony Jackson and that prompted her to come forward, something general and innocuous like that.** Certainly she can talk about this was generated by a law enforcement inquiry; but if she can stay away from the charges, we're going to be a lot better off.

MR. SIMPSON: Okay. I think I can coach her on that. I talked to her about that yesterday too. And, of course, a lot of that depends on what you ask her on cross-examination, what I can get into, I'm assuming, after that. But that's the way – those are my –

THE COURT: So, I mean, that – the evidence of prior crimes and prior acts can come in if the door gets opened on that. But, I mean, right now that – you want to **treat that as being unfairly prejudicial, the prejudice doesn't outweigh the probative value**. But if there's a door gets [sic] opened, then that does come in.

(Tr. Trial, p.33, L.21 – p.36, L.1 (emphasis added).)

At that time, the prosecution had been informed that any evidence about the charges mentioned in the television report were not admissible, overly prejudicial evidence, that the prosecution's witnesses must be coached to avoid any mention of the evidence, and that they must keep any reference to the television report to it being a "law enforcement inquiry" or "something general and innocuous like that." However, the

prosecutor quickly disregarded the district court's order stating the following in his opening statement: "If I remember right, she, when this initially happened, she told her mother as I recall; but it wasn't until 2007, in January of 2007, when **there was a report on the news that anybody who had been molested by Pony Jackson**, if they would contact the sheriff's office or law enforcement office had wanted them to do that. . . . " (Tr. Trial, p.136, Ls.1-8 (emphasis added).)

The prosecution again crossed the line when it asked K.W. the following and allowed her to present an answer clearly in violation of the order:

> Q. When you were older, did there come a time when you reported this incident?
>
> A. Yes.
>
> Q. What brought that about?
>
> A. My mom called me and told me that on the news they had said that Pony Jackson had been arrested and that **anybody else that had been molested by him**, to please come forward.

(Tr., p.185, L.23 – p.186, L.5.)

Each of the comments implied that Mr. Jackson was on the news because he had been molesting other children. While they did not specifically reference his possession of child pornography charges, they referenced something arguably worse, that he had been actively involved in molesting numerous children, the same type of prejudicial evidence that the district court ruled was inadmissible because the prejudicial effect was outweighed by any probative value. The district court's rule was clear and

the prosecutor's total disregard of the order was misconduct. However, defense counsel failed to object to the statements.[7]

[7] In ruling on a similar issue presented on direct appeal, whether it was prosecutorial misconduct for the prosecution to make such a statement in opening and to elicit such testimony from the alleged victim, the Idaho Court of Appeals found:

> [T]he district court held that the prosecutor could make his point and avoid prejudice to Jackson by eliciting from the victim that "there was a law enforcement inquiry regarding Pony Jackson and that prompted her to come forward, something general and innocuous like that." The court further directed the prosecutor to instruct the victim on this limitation to her testimony. Notwithstanding this ruling, in his opening statement the prosecutor said, "[I]t wasn't until 2007, in January 2007, when there was a report on the news that anybody who had been molested by Pony Jackson, if they would contact the sheriff's office or law enforcement had wanted them to do that." Then the prosecutor elicited from the victim testimony that she contacted the sheriff's department because "on the news they had said that Pony Jackson had been arrested and that *anybody else* that had been molested by him, to please come forward." (Emphasis added.) . . . Defense counsel did not object, move to strike the testimony or argument, or request a mistrial.
>
> Here, the trial court's order prohibiting reference in front of the jury to the content of the news broadcast that implied other offenses by Jackson was not based upon any constitutional right but apparently upon the trial court's determination that such evidence was inadmissible under Idaho Rule of Evidence 404(b) [and, as such, not reviewable under the fundamental error doctrine]. There being no demonstration that the prosecutor's alleged misconduct in disobeying the pretrial order violated one or more of Jackson's unwaived constitutional rights, no fundamental error has been shown.

State v. Jackson, 151 Idaho 376, 378-80 (Ct. App. 2011). It is important to note that the Court of Appeals did not determine that the prosecutor's statement or those elicited from K.W. were not a violation of the district court order, it simply found the error to not be eligible for fundamental error review. This finding is contrary to other alleged misconduct errors raised in direct appeal where the Court of Appeals determined that the alleged misconduct was not misconduct and, as such, could not be meet the first prong of fundamental error. (*See generally Jackson,* 151 Idaho 376.) Further, the language used by the Court of Appeals seems to imply that it believed the prosecutor's actions may have violated the pre-trial ruling.

It was also the opinion of the petitioner's expert witness that the pre-trial ruling did not merely prohibit statements about the child pornography, but required something vague to avoid prejudice to Mr. Jackson. Ms. Taylor noted that she would have objected and that the statement was in violation of the court's order to say that there was a law enforcement inquiry. (Tr. 3/12/14, p.34, Ls.6-22.) Ms. Taylor noted that:

> [T]he language the Court approved and instructed on was really just vague. A law enforcement inquiry could be anything. Do you know the whereabouts of this guy? This guy was involved in getting his truck hit last night. It could mean anything. It doesn't necessarily say that law enforcement wants to know about anybody who's been molested by this person. That the whole way you look at that work being inserted in there changes the view. All of ... a sudden, the jury know that law enforcement is looking for Mr. Jackson for molestation victims. It just changes it. Rather then just a general inquiry about him, which could be anything. Him being lost, him being stranded, him having been in a bar fight. It could be anything.

(Tr. 3/12/14, p.34, L.24 – p.35, L.13.) The testimony continued:

> Q. And when you read the Judge's pretrial ruling on page 34 and page 35, is that in your opinion [what] the judge is trying to avoid and that's why the judge says something general and innocuous.
>
> A. That's exactly – I think the Court was trying to avoid the situation where pictures started being painted in the juror's minds.
>
> Q. And that picture being painted in the jury's mind is that there was a prior problem with molestation?
>
> A. Yes.

(Tr. 3/12/14, p.35, Ls.14-23.)

The key language in the trial court ruling is that the prosecution could present something "general and innocuous." Contrary to the State's assertions and district court's findings, it did not merely keep the prosecution for mentioning the child pornography charges. Mentioning the news report in such a way as to convey to the

jurors information that Mr. Jackson had molested other children was not, under any stretch of the imagination, "innocuous." The district court failed to analyze the entire ruling from the trial court and, in so doing, failed to grasp the plain and obvious meaning behind the ruling. Instead, it followed the State's logic in picking and choosing what portions of the trial ruling were actually applicable and completely disregarded the "general and innocuous" language. When the ruling is read in its entirety, it is clear that the prosecution's statements in the opening argument and in eliciting a similar statement from K.W. did violate the trial court's order. As such, based on the plain language used by the trial court and the expert opinion offered by the petitioner, the district court's ruling is clearly erroneous.

2. The District Court's Ruling That The Evidence Was Admissible Under Idaho Rules Of Evidence 403 and 404(b) Is Erroneous

The district court also ruled that:

> The judge's order regarding the Solicitation was based, in part, on Rule 404(b). Under *Gomez,* there are two tiers that must be considered in determining the admissibility of evidence of prior bad acts. The first tier involves a two part inquiry concerning the sufficiency of the evidence and relevance. The second tier involves the determination of whether the probative value of the evidence is substantially outweighed by unfair prejudice.
>
> a. Evidence of Prior Bad Acts
>
> The prior bad act referred to in this claim was Jackson's possession of child pornography. Jackson and the State acknowledged Jackson's prior conviction for possession of child pornography. The conviction and acknowledgments were sufficient to establish Jackson's prior possession of child pornography as a fact.
>
> b. Relevancy of the Solicitation
>
> . . . Testimony regarding the Solicitation was offered to explain why the Victim reported the alleged crimes when she did, not as evidence of the

> crimes or propensity to commit those crimes. The testimony was relevant to that issue. That relevance was sufficient to satisfy the second requirement of the first *Grist* tier.
>
> c. Unfair Prejudice
>
> . . . The prosecutor's comments concerning the Solicitation were both probative and prejudicial. However, Jackson did not plead or point to evidence upon which he bases an assertion that the comments referred to in claim two were "unfair."
>
> The comments objected to by Jackson didn't suggest that the decision in this case made on an improper basis. They were not "unfairly" prejudicial. And, if they had been properly offered as evidence, they should not have been excluded under Rules 403 and 404(b).

(R., pp.206-207.)

It is important to note that it appears the district court is analyzing whether or not information about the child pornography charges could have been admitted at trial. However, that issue was not presented in the post-conviction and there is no reason to second guess the trial court's determination that the child pornography information was of limited relevancy and was overly prejudicial. The proper question is whether or not the information that Mr. Jackson may have molested other individuals was admissible under I.R.E. 403 and 404(b). It is not.

It is a fundamental tenet of the American legal system that a defendant may only be convicted based upon proof that he committed the crime with which he is charged, and not based upon poor character. *State v. Wood*, 126 Idaho 241, 244 (Ct. App. 1994). Evidence of misconduct not charged in an underlying offense may have an unjust influence on the jurors and may lead them to determine guilt based upon either: (1) a presumption that if the defendant did it before, he must have done it this time; or (2) an opinion that it does not really matter whether the defendant committed

the charged crime because he deserves to be punished anyhow for other bad acts. *Id.* at 244-45. "The prejudicial effect of [character evidence] is that it induces the jury to believe the accused is more likely to have committed the crime on trial because he is a man of criminal character." *State v. Grist*, 147 Idaho 49, 51 (2009) (quoting *State v. Wrenn*, 99 Idaho 506, 510 (1978)).

I.R.E. 404 provides in pertinent part:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that the prosecution in a criminal case shall file and serve notice reasonably in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

I.R.E. 404(b). "Admissibility of evidence of other crimes, wrongs, or acts when offered for a permitted purpose is subject to a two-tiered analysis." *Grist*, 147 Idaho at 52. "First, the trial court must determine whether there is sufficient evidence to establish the other crime or wrong as fact." *Id.* (citations omitted.) "The trial court must then determine whether the other crime or wrong is relevant to a material and disputed issue concerning the crime charged, other than propensity." *Id.* (citations omitted.) This evidence is only relevant if the jury can reasonably conclude that the act occurred and that the defendant was the actor. *Id.* (citation omitted.)

Mr. Jackson asserts that the statement of the prosecutor during opening and the related statement made by K.W. were inadmissible.

a. Offer Of Proof

Grist requires, [f]irst, the trial court must determine whether there is sufficient evidence to establish the other crime or wrong as fact." *Grist*, 147 Idaho at 52. The district court did not analyze whether there was sufficient evidence to establish that Mr. Jackson had molested other individuals as implied by the statements. In fact, no evidence was presented that he had molested any other individuals. On this basis alone, the evidence is inadmissible.

b. Relevance For A Non-Propensity Purpose

Under I.R.E. 404, "evidence of prior crimes or wrongs is inadmissible to prove the defendant's character or propensity to commit such acts." *State v. Blackstead*, 126 Idaho 14, 17 (Ct. App. 1994). However, evidence of other crimes may be admitted when relevant for the purposes of proving: knowledge, identity, plan, preparation, opportunity, notice, intent, and the absence of mistake or accident. I.R.E. 404(b); *Id.*

The evidence that Mr. Jackson may have molested other individuals does not fall under any of the named relevant purposes of I.R.E. 404(b). While submitting evidence of why an alleged victim came forward is not an attempt to prove character or propensity, adding in that Mr. Jackson molested other individuals transforms this information into character evidence. It was wholly unnecessary to add the language about molestation. Instead, the prosecutor and K.W. could have merely stated that she came forward in response to a police inquiry, just as the trial court ordered. There is no permissible purpose for adding in the molestation information other than to provide prejudicial propensity evidence which is specifically prohibited. *Grist*, 147 Idaho at 51.

As such, there is no relevant purpose for admitting the portions of the statements that refer to molestation.

c. The Evidence Was More Prejudicial Than Probative

Finally, even if relevant, the evidence should have been excluded under I.R.E. 403. Under I.R.E. 403, relevant evidence can be excluded by the district court if, *inter alia*, the probative value of that evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, danger of misleading the jury, or if the evidence would involve needless presentation of cumulative evidence. *State v. Tapia*, 127 Idaho 249, 254 (1995).

Prior sexual misconduct evidence is indeed highly prejudicial. As Justice Bistline wrote in *Moore*:

> Balancing the prejudice against the probative value is **especially vital in sex abuse cases where the possibility for unfair prejudice is at its highest**.
>
> Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise.

State v. Moore, 120 Idaho 748, 745, 819 P.2d 1143, 1148 (1991) (Bistline, J., dissenting) (emphasis added) (quoting Slough and Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325, 333-34 (1956)).

In this case, even assuming *arguendo* that the evidence was relevant, it was highly prejudicial; a fact that initially, the district court was well aware of. In addressing claim two in the Memorandum Decision Re: Motion for Summary Dismissal, the district court noted that the prosecution's comment about the television broadcast could have been "permissible under Rule 404(b)." (R., p.111.) But it continued, "[t]he trial court's ruling regarding admissibility of the television broadcast was proper under Rule 403

because it was overly prejudicial. Jackson's attorney should have objected to its admission and there was a reasonable possibility its admission adversely affected Jackson's case." (R., p.112.)

Additionally, the expert witness for Mr. Jackson opined that the statements were overly prejudicial:

> A. Well, it's in the opening statement. It begins the trial with the jury thinking that the police are looking for this individual, and people that he molested. People in the plural. Because – specifically, the Court warned against having the jury have that picture painted from opening statements. That would be evidence of other bad acts.
>
> I agree it's not a specific bad act, but certainly it would leave in the juror's mind that there's other bad acts out there that this person must be out molesting children and that's why law enforcement [are looking for] him. It's the picture, I believe, the Court wanted to prevent. I think it's prejudicial. I think it sets the jury's mind in motion to begin hearing evidence a certain way.
>
> Often times we're first impression people. The first thing we hear, and juries are like this, the first thing they hear they try to fit everything else in to match the first picture that they've planted in their mind. That's the challenge of being a defense attorney is to undo that picture sometimes. But using the [word] molesting starts that picture right away, and everything beings to fit into there. And I think that's what the trial court wanted to avoid.

(Tr. 3/12/14, p.36, Ls.2-25.)

Contrary to the district court's ruling that Mr. Jackson did not point to evidence that the statements were "unfair," he did provide evidence regarding this issue. He asserts, as he did at the evidentiary hearing, that the statements where overly prejudicial and that the danger of unfair prejudice outweighs the prejudicial effect.

As such, Mr. Jackson asserts that the statements were inadmissible under I.R.E. 403 and 404(b).

3. The District Court Ruling That Defense Counsel's Failure To Object Or Motion For A Mistrial Was A Strategic Decision Is Erroneous

The district court also ruled that:

> Once the prosecutor had made his comments regarding the Solicitation in his opening statement, Jackson's attorney had two basic options. First, he could do nothing. Second, he could object to the statement. And objection may have served only to emphasize the issue for the jury.
>
> Jackson's trial attorney's decision not to object to the prosecuting attorney's statement regarding the Solicitation was a tactical decision and consistent with his trial strategy.

(R., p.208.)

However, this ruling is contrary to the evidence that was presented at the evidentiary hearing. Mr. Erikson, Mr. Jackson's trial attorney, testified at the evidentiary hearing. He testified that he did not recall the prosecutor making the statement during the opening argument, that he believed what was said was "out of bounds" based on the pre-trial order, and that he had no recollection of why he did not object. (Tr. 3/12/14, p.112, Ls.4-24.) Mr. Erikson also noted that at times he does not object during opening statement's unless it is an egregious statement by the prosecutor because he does not want to highlight the evidence, but that in this case he "really just [did] not recall the opening statement at that time why I did or did not do what I did." (Tr. 3/12/14, p.113, Ls.1-9.) He also had no memory of K.W.'s testimony about the same report. (Tr. 3/12/14, p.113, Ls.10-23.) He noted that her statement was "probably something if I would have objected the Court would have thrown out." (Tr. 3/12/14, p.114, Ls.4-8.)

Mr. Erikson noted that information about prior sexual bad acts is so prejudicial, and that it taints the jury against a defendant. (Tr. 3/12/14, p.124, Ls.17-19, p.126, L.17 – p.127, L.2.) He again reiterated that he did not recall what he was thinking at the time

the prosecutor made the statement in his opening or when K.W. made her related statement, and that while he does not know why he did what he did, in retrospect he should have objected. (Tr. 3/12/14, p.129, Ls.8-24.) Mr. Erikson noted that his main trial strategies were to cross-examine K.W. and to take affirmative steps to impeach her, but that these strategies did not pertain to his failure to object to the opening statement. (Tr. 3/12/14, p.136, L.7 – p.137. L.16.)

Mr. Erikson did not testify that it was a tactical decision not to object, although he noted that at times a failure to object during opening has been a strategic decision. In this case, he openly admitted that he should have objected in both instances and denied that failing to object was part of his strategy.[8] As such, there was no evidence presented that trial counsel's failure to object, in these instances, was a strategic decision and the district court's finding that Mr. Erickson had made a tactical or strategic decision is clearly erroneous.

4. Mr. Jackson Proved That He Received Constitutionally Deficient Performance Of Counsel In Both Claims Two And Seven And That He Was Prejudiced By The Deficient Performance

Mr. Jackson provided sufficient evidence to prove both deficit performance and demonstrate prejudice. The following evidence proves that Mr. Jackson received constitutionally deficient performance: Mr. Jackson offered evidence of the trial court's pre-trial ruling by submitting the trial transcript. (R., p.202.) The language of the pre-trial ruling is clear and plainly prohibited the prosecutor's statement in opening

[8] Because Mr. Jackson's trial attorney did not testify that his failure to object was a strategic decision, Mr. Jackson does not assert that the failure to object was a decision that is shown to have resulted from inadequate preparation, ignorance of the relevant

statements and the statement elicited from K.W. *See supra* Section C(1). The statements implied that Mr. Jackson had molested other victims and was not properly admitted under I.R.E. 404(b). *See supra* Section C(2). Mr. Jackson's trial attorney admitted that the failure to object was not part of his overall strategy and, in hindsight, that he should have objected to both statements. *See supra* Section C(3).

Furthermore, Mr. Jackson offered the testimony of an expert witness who testified that the failure to object and/or motion for a mistrial was ineffective assistance of counsel and Mr. Jackson was prejudiced by the failure to object:

> Q. And when you read the Judge's pretrial ruling on page 34 and page 35, is that in your opinion [what] the judge is trying to avoid and that's why the judge says something general and innocuous.
>
> A. That's exactly – I think the Court was trying to avoid the situation where pictures started being painted in the juror's minds.
>
> Q. And that picture being painted in the jury's mind is that there was a prior problem with molestation?
>
> A. Yes.
>
> Q. And you believe that is prejudicial?
>
> A. Yes.
>
> Q. Why?
>
> A. Well, it's in the opening statement. It begins the trial with the jury thinking that the police are looking for this individual, and people that he molested. People in the plural. Because – specifically, the Court warned against having the jury have that picture painted from opening statements. . . . [C]ertainly it would leave in the juror's mind that there's other bad acts out there that this person must be out molesting children and that's why law enforcement [are looking for] him. . . . I think it's prejudicial. I think it sets the jury's mind in motion to begin hearing evidence a certain way.

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law, or other shortcomings capable of objective review, as such argument is unnecessary.

> Often times we're first impression people. The first thing we hear, and juries are like this, the first thing they hear they try to fit everything else in to match the first picture that they've planted in their mind. That's the challenge of being a defense attorney is to undo that picture sometimes. But using the [word] molesting starts that picture right away, and everything beings to fit into there. And I think that's what the trial court wanted to avoid. . . . By not objecting that just allowed a lot of leeway for what followed in the transcript and the other things that happened.

(Tr. 3/12/14, p.35, L.14 – p.37, L.8.)[9] Ms. Taylor concluded that a motion for mistrial would have been appropriate and the failure to make such motion prejudiced Mr. Jackson. (Tr. 3/12/14, p.37, Ls.9-16.)

The deficient performance of trial counsel prejudiced Mr. Jackson and there is a reasonable probability that the result of the proceeding would have been different had his attorney objected to the statements. The underlying case was a close case that relied fully on the testimony of one witness, the alleged victim, discussing her alleged molestation well over a decade earlier. The district court recognized this in the Memorandum Decision Re: Motion for Summary Dismissal, the district court noted that:

> Due to the lapse of time between the alleged incident and the trial, evidence against Jackson was limited primarily to the victim's testimony. Because she was only four years old at the time of the alleged incident and sixteen years had passed since the alleged occurrence, her testimony was subject to question. In other words, the evidence against Jackson was not so persuasive that Jackson's claims, even if correct, failed to affect the outcome of the trial.

(R., p.106.) Mr. Simpson, the prosecutor who prosecuted Mr. Jackson, also noted that the entire case came down to the credibility of the alleged victim, that the verdict was

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[9] The district court also ruled that Mr. Jackson did not argue that the result of the trial would have been different. (R., p.208.) However, he asserts that this is incorrect based on the evidence presented at the hearing which was clearly presented to illustrate how the trial was affected by the failure to object. It is implicit in the testimony from the expert that the trial was unreliable because of the influence hearing these statements could have had on the jury.

dependant on whether the jury believed the alleged victim, and that her testimony was the only evidence in the State's case to prove Mr. Jackson's guilt. (Tr. 3/12/14, p.87, Ls.8-17.)

Because this case hinged on whether or not the jury believed K.W.'s testimony about events that allegedly occurred many years earlier, when she was very young, any information that police believed or that there actually were other victims of molestations may have influenced the jury's credibility determination. Courts have long recognized the propensity evidence must be excluded because of the concern that a jury may find that if a defendant committed an offense before that they are more likely to have committed one again because they are a man of criminal character. *State v. Grist*, 147 Idaho 49, 52 (2009) (quoting *State v. Wrenn*, 99 Idaho 506, 510 (1978)). In Mr. Jackson's case, the evidence was fairly week and the jury may have decided to believe K.W.'s version of events based partially on a bias formed from hearing the controversial statements which provided information that Mr. Jackson had molested other individuals.

Therefore, Mr. Jackson received deficient performance, the result of his trial was unreliable, and there is a reasonable probability that the result of the proceeding would have been different had he not received deficient performance.

CONCLUSION

Mr. Jackson respectfully requests that this Court vacate the district court's order dismissing his petition for post-conviction relief and to remand the case to the district court with instructions that he receive a new trial.

DATED this 9th day of December, 2014.

ELIZABETH ANN ALLRED
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 9th day of December, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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